SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 1173

HUBERT STILL, ET AL,
Petitioners,

v.

ROSSVILLE CRUSHED STONE COMPANY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK M. GLEASON,
102 Howard Street,
Rossville, Georgia 30741,

MORGAN & GARNER,
100 Maclellan Building,
Chattanooga, Tenn. 37402,

Attorneys for Respondent.

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent is satisfied with the statement of counsel for petitioners as respects (1) OPINIONS BELOW and (2) JURISDICTION.

QUESTION PRESENTED

Respondent contends that the question presented is whether the United States District Court for the Eastern District of Tennessee, Southern Division, has jurisdic-

tion of a nontransitory local action seeking to recover money damages for injuries to land in Georgia and injunctive relief against the commission of a nuisance in the operation of a rock quarry in the State of Georgia.

CONSTITUTIONAL PROVISION

Respondent contends that no question involving the cited constitutional provision is presented.

STATUTES INVOLVED

Here the Petition for Certiorari deals with a venue statute of the United States (28 U.S.C. 1391(a)) which by its very terms fixes venue in a civil action, when it is founded on diversity of citizenship. In those cases the action must be brought where all the plaintiffs or defendants reside.

In actions for damages to real estate *quare clausum fregit* the action is strictly local and jurisdiction is therefore in the courts, state or federal, where the land lies.

FEDERAL RULES OF CIVIL PROCEDURE

The cited rules have no application.

STATEMENT OF THE CASE

The facts stated are correct.

ARGUMENT

(1) ***DECISIONS OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS FOLLOW THE DECISIONS OF THIS COURT. THE DECISIONS OF THIS COURT ARE NOT IN CONFLICT.***

The venue of the action is in the State of Georgia where the land lies. The Tennessee United States District Court has no jurisdiction.

One of the petitioners in this case, John H. McCormick, filed a suit in the Courts of Tennessee on a similar claim in 1956. The Supreme Court of Tennessee in ***McCormick v. Brown***, 201 Tenn. 166, ruled that the Courts of Tennessee had no jurisdiction of the controversy and that the action must be brought in the State of Georgia where the land lies. This decision controls this case. Under ***Erie v. Tompkins***, 304 U.S. 64 (1938), the U. S. District Court was required to apply the law of Tennessee.

The learned District Judge Darr (Page 17, Appendix A to Petition for Certiorari) pointed out that the Tennessee and Georgia law is the same and that the law in both states comports with the Federal Law as decided by this Court in ***Ellenwood v. Marietta Chair Company***, 158 U.S. 105, 39 L. ed. 913, 15 S. Ct. Rep. 771. The rule is so clearly stated by this Court in the ***Ellenwood*** case that the question is not debatable. It said:

> "By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title of the possession of the land itself, is a local action, and can only be brought within the state in which the land lies."

As pointed out by the Sixth Circuit Court of Appeals (Page 22) jurisdiction is the power to adjudicate, while venue relates to the place where such judicial power will be exercised.

It is contended by petitioner that the decision of this Court in the case of *Wetmore v. Tennessee Copper Company*, 218 U.S. 369, 31 S. Ct. 84 (the opinion in *Ladew v. Tennessee Copper Company*, 218 U.S. 357, 365 (1910) being adopted) conflicts with the decision of this Court in *Ellenwood v. Marietta Chair Company*, *supra*, and therefore an important question is presented which requires the grant of certiorari.

The *Ellenwood* case, *supra*, involved an action in two counts; trespass to land, and the cutting and removing of timber therefrom, thus trespass and conversion were involved. The ruling of this Court was that the count, as respects the trespass, was a local action and therefore the suit could be brought only where the land lies. The further ruling was that as to the alleged conversion, the action might have been considered transitory. However, the petition was amended so as to allege in one single count a continuing trespass leaving the claim for conversion for timber cutting incidental only. The entire cause of action, said this Court, was local and the Circuit Court of the United States, sitting in Ohio, had no jurisdiction.

In the *Tennessee Copper Company* case, *supra*, Ladew, et al, citizens of New York and West Virginia, as the owners of timberlands in Georgia attempted to recover against the Copper Company for the destruction of their forests by fumes and gases coming from the copper smelting works of the New Jersey Corporation,

at Copperhill, Tennessee, by an action in the U. S. District Court for the Eastern District of Tennessee. Process was served on the Copper Company, a New Jersey corporation, and the Ducktown Sulpher and Iron Company, Limited, a British Corporation. The plaintiffs were citizens of New York and West Virginia. Because both defendants were non-resident corporations and because under the law (as it then existed) a suit founded only on the fact of diversity of citizenship between the parties could be brought only in the District of the residence of either the plaintiff or the defendant, it was contended that the U. S. District Court in Tennessee was without jurisdiction.

The plaintiffs responded to this contention with the claim that the U. S District Court in Tennessee had jurisdiction under a substituted service statute of the United States, providing that when any suit was commenced in a Circuit Court to enforce an equitable lien, or *claim to*, or to remove a cloud upon the title to real or personal property, and one of the defendants was a non-resident, constructive service could be obtained on such non-resident by publication. This Court ruled that such contention was without merit, and said that a suit to enjoin a trespass or obtain protection against the effect of a nuisance was not a "claim to" real property and therefore substituted service could not be perfected by publication and the District Court had no jurisdiction. *Wetmore's* case, *supra*, adopted the opinion of this Court in *Ladew's* case. It will be seen that there is an altogether different factual situation between the *Wetmore* and *Ellenwood* cases. The "conflict" alleged in the petition is non-existent.

(2) *NO INJUSTICE IS PRODUCED BY THE DECISION AND THE PETITIONERS HAVE A FULL AND COMPLETE REMEDY.*

The plaintiffs may sue the defendants in the Superior Court of Walker County, Georgia, where they have an office and a place of business, or they may file a suit in the United States District Court for the Northern Division of Georgia, Rome Division, based on diversity of citizenship.

Rossville Crushed Stone v. Massey, 219 Ga. 467, 133 S.E. 2d 874 (1963), did not hold that the suit would not lie in Georgia. The ruling was that the plaintiffs had failed to follow the State law and properly perfect service on the defendant as required by the Georgia Service Statute. The merits of the controversy have never been decided.

Livingston v. Jefferson, 15 F. Cases 660 (1811), a celebrated case in its day, was based on English law which drew a distinction between transitory and local actions. While the decision has been criticized and said to have been the "product of politics" (See Moore's Federal Practice, Vol. 1, Page 1466, Section 0.142(2-3)) and some states have refused to follow it, the majority of states have in fact followed the rule of law announced therein and Tennessee is one of those states.

(3) *THE JURISDICTION OF THE UNITED STATES DISTRICT COURT IS NOT CONTROLLED BY THE DECISION.*

The contention that the decision controls the jurisdiction of the United States District Court is without merit. The United States District Court for the Northern District of Georgia, Rome Division, has jurisdiction of the controversy.

The argument that "a United States District Court in the State of Georgia may not have power to adjudicate over the Tennessee corporation" is not sustained by any authority. Defendant, according to the complaint, maintains its place of business in the State of Georgia and is doing business in Georgia as a foreign corporation.

By virtue of Title 28, Section 1391(c), U.S.C.A., a corporation may be sued in any judicial district in which it is doing business.

(4) ***THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION WAS NOT VIOLATED BY THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS.***

The cited case of ***Hughes v. Fetter***, 341 U.S. 609, 71 S. Ct. 980, has no application to the case at bar. In that case an action was brought in a State Court of Wisconsin to recover damages for the death of a person who was killed in the State of Illinois. Because the Wisconsin death Statute vested jurisdiction in State Courts only for deaths which occurred in that state, the State Court dismissed the suit and the Wisconsin Supreme Court affirmed. This Court granted certiorari because the local Wisconsin Statute violated the full faith and credit clause of the Federal Constitution, and (with four Justices dissenting) reversed. The case simply has no application here.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FRANK M. GLEASON,
102 Howard Street,
Rossville, Georgia,

MORGAN & GARNER,
100 Maclellan Building,
Chattanooga, Tennessee,

Attorneys for Respondent.

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